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No. 31.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

W. WILLARD WIRTZ, Secretary of Labor,
Petitioner,

v.

STEEPLETON GENERAL TIRE COMPANY, INC., and
A. E. STEEPLETON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR THE RESPONDENTS.

QUESTION PRESENTED.

Is the phrase "recognized as retail sales or services in the particular industry" in Section 13 (a) (2) and (4) of the Fair Labor Standards Act to be construed and applied according to theoretical, text-book criteria rejected by Congress or is that phrase to be applied according to the habits, customs and practices in the particular industry as it was in this case by the district court and by the court of appeals?

STATEMENT OF THE CASE.

Petitioner's Statement is inaccurate; it omits facts the courts below considered to be determinative in this case. Facts material to the consideration of the question presented are in the findings of fact by the district court (R. 32a-37a). Testimony supporting the more salient of those findings is succinctly paraphrased in the opinion of the court of appeals, 330 F. 2d 804, 807-808.

ARGUMENT.

Summary.

This case should determine whether or not the Wage-Hour Administrator will be permitted to ignore in the future, as in the past and present, the plain intent of Congress in 1949 when Section 13 (a) (2) and (4) of the Fair Labor Standards Act were enacted. In this case, as in many others under those subsections, the petitioner's experts classified sales in strict accordance with the business use test, long ago held by this Court to have been rendered inapplicable under those sections by Congress in 1949, and supported their classifications by reference to text books or statistical lore repeatedly held by courts of appeal to be immaterial to a determination of the recognition in the particular industry test.

The full debate and reports upon the 1949 amendments to the Fair Labor Standards Act amply supply the legislative intent when Section 13 (a) (2) and (4) were enacted. In order to accomplish the Administrator's persistent program to eliminate the exemption for retailers, petitioner in this case argues that a further limitation upon the scope of Section 13 (a) (2), not actually mentioned in Congress until 1957, when it met with no success, was somehow an undisclosed part of the legislative consciousness in 1949. What was disclosed and in fact plainly said as reflecting the legislative purpose in 1949 is not and cannot be relied upon by petitioner if the Administrator's purpose is to be served.

There is no dispute in this record but that the recognition of retail sales in the particular industry involved in this case includes all sales not for resale. There is no dispute but that the Administrator was fully advised of this uniform recognition in all segments of this particular

industry before his staff devised the Interpretative Bulletin which the court below found to be contrary to the customary habits and practices in this particular industry from overwhelming evidence and further found such habits and practices not to be of recent origin, not to have been adopted to avoid wage-hour law coverage, but to have been traditional and to have existed long before 1949. This should sufficiently support an exemption under Section 13 (a) (2) and (4).

I. Construction of the Phrase "Recognized as Retail—in the Particular Industry" Presents An Issue of Fact to Be Decided By Reference to Industry Sources.

The "primary issue in this case" which petitioner chooses to argue (Brief for the Petitioner, hereinafter "Brief", p. 15) is whether the application of Section 13 (a) (2) and (4) of the Fair Labor Standards Act presents a question of law or fact. It is a question of fact to be determined by reference to the habits and practices in the particular industry. One of the proponents of the 1949 amendment at issue here stated:

> "Hardly an industry can be found in which the question of what is retail and what is wholesale has not been settled for years. **It is a question of fact just as much as any other question of fact.**" (Emphasis added.)
>
> (95 Cong. Rec. 12516.)

The actual "primary issue" in this case is not specifically stated in said Brief and certainly is not the resolution of the test under the 1949 amendment as an issue of law or fact. Petitioner's primary concern is that the 1949 amendments require the Wage and Hour Administrator to ascertain and apply the exemption under Section 13 (a) (2) and (4) according to habits and practices in the particular industry. During the debate upon these amend-

ments proponents observed that the Administrator could discover the recognition of "retail" in any industry "by honest search" and "give effect to it" and that, without search:

> "any sale or service to a private consumer, businessman who does not purchase to resell, or farmer **will have to be treated by the Administrator and courts as a retail sale or service, so long as such sale or service is recognized in the particular industry as a retail sale or service.**" (Emphasis added.)
>
> (95 Cong. Rec. 12502,
>
> see also 95 Cong. Rec. 11003.)

The House Conference Report on these 1949 amendments reaffirms the mandatory nature of the industry recognition test upon the Administrator:

> "Under this test any sale or service, regardless of the type of customer, **will have to be treated by the Administrator and courts as a retail sale or service,** so long as such sale or service is recognized in the particular industry as a retail sale or service." (Emphasis added.)
>
> (95 Cong. Rec. 14932.)

The Administrator's staff when devising the Interpretative Bulletin (Plaintiff's Exhibit 6) and otherwise directing the application of the Section 13 (a) (2) and (4) to respondents and other businesses (R. 771a-772a) concluded from the legislative history of the 1949 amendments that ". . . we weren't to accept the contention of the industry and let them make their own definition or decide for themselves what was at retail and what was at wholesale" (R. 772a).

Petitioner's refusal to accept the 1949 legislative mandate that the "habits and practices" in a particular in-

dustry (95 Cong. Rec. 12510) were to be ascertained by the Administrator and then applied under the 1949 amendments, has been expressed in several ways. An early expression of this refusal was the so-called Report of the majority of Senate Conferees, frequently cited in petitioner's Brief and in Plaintiff's Exhibit 6, the Interpretative Bulletin in which the Administrator construed and applied the 1949 amendments to Section 13 (a) (2) and (4). As described by Senator Taft, without contradiction since by anyone, the Administrator's attorneys prepared this Report as part of the Administrator's effort to nullify the 1949 amendments and in it confirmed the very interpretations of coverage by the Fair Labor Standards Act which the 1949 amendments reversed (95 Cong. Rec. 14880). A later expression of the Administrator's refusal to accept the clear legislative mandate under the 1949 amendments to give effect to the particular industry's recognition of the term "retail", was his staff's decision that the legislative history of the 1949 amendments made an industry's definition of "retail" unacceptable for purposes of administering the Section 13 (a) (2) and (4) exemption (R. 772a). The staff decision, as expressed in its publication (plaintiff's Exhibit 6), was to apply the business use test and other criteria from theoretical on textbook sources to define and delimit "retail" sales for purposes of Section 13 (a) (2) and (4) exemption. The business use test and theoretical sources had been adopted and recommended by the Administrator during and before 1948 (see e. g. excerpts from the Administrator's 1948 annual report, 95 Cong. Rec. 12493-4). These criteria were criticized by the sponsors of the industry recognition test in 1949 as being "wrong", "artificial", "ignor(ing) the realities of local business" (95 Cong. Rec. A4569-70), and as "silly, illusory, and ridiculous" criteria (95 Cong. Rec. 12494-5). "To get away from that kind of interpretation" (ibid.)

these sponsors proposed and Congress passed the industry recognition test. This case evidences the continuing effort of the Administrator to apply the business use test and criteria from theoretical or governmental sources when defining "retail" for wage-hour law purposes. Petitioner's experts in this case followed that pattern exclusively (R. 700a, 735a, 737a, 765a-766a, 767a, 769a, 770a, 806a-811a, 813a, 817a). As noted in the opinion for the Sixth Circuit Court of Appeals in this case, petitioner's professorial experts "cited no authority from anyone connected with the tire industry in support of their definitions or classifications" (330 F. 2d 808). The latest implementation of the Administrator's stubborn refusal to give up the business use test and theoretical criteria as devices to restrict exemption from wage-hour law under the 1949 amendments is the argument in petitioner's brief that the industry recognition test involves an issue of law. There is no support for that contention in the legislative history of the 1949 amendments. The industry recognition test was described by its proponents as presenting solely a fact question (95 Cong. Rec. 12516) and was enacted by both Houses in the form so described (95 Cong. Rec. 12495, 12499, 14931). The industry recognition test has been explicitly construed as presenting an issue of fact by a circuit court of appeals on the only occasion, so far as we can ascertain, that any explicit holding on this point was made, **Rachal v. Allen**, 321 F. 2d 449, 451; circuit courts of appeal have repeatedly treated the industry recognition test as a fact issue to be decided upon the testimony of experienced persons in the particular industry, **Wirtz v. Modern Trashmoval, Inc.**, 323 F. 2d 451, cert. den. 377 U. S. 925; **Mitchell v. City Ice Co.**, 273 F. 2d 560; **Mitchell v. T. F. Taylor Fertilizer Works**, 233 F. 2d 284, and **Boisseau v. Mitchell**, 218 F. 2d 734. The legislative history of the 1949 amendments directs the sources to be analyzed in making this

factual determination: trade associations are a "quite persuasive" source (95 Cong. Rec. 12501); definitions for sales tax purposes can be relied upon as promulgated by persons who "are supposed to know the difference between wholesalers and retailers" (Id., at 12502); competitors in the same industry and their employees (Id., at A4570, 12502) and other local retailers of the same products (Id., at 12497) are examples of knowledgeable industry sources on this issue. Respondents' witnesses were from these categories of informed persons in the tire industry. Petitioner's leading counsel at the trial of this case, after hearing only some of them, conceded that the industry's position is not disputed in this record (R. 282a) and petitioner's Brief in this Court makes the same concessions as to the tire industry's usage (Brief, p. 20).

II. The Phrase "The Sale and Servicing of Manufacturing Machinery and Manufacturing Equipment Used in the Production of Goods" Does Not Encompass Sales and Services to Carriers or "Commercial" Sales.

Petitioner contends that the above-quoted phrase from the statement of the Managers on the Part of the House which accompanied the Conference Report on the 1949 amendments of the Fair Labor Standards Act (95 Cong. Rec. 14932) expressed legislative intent to treat sales to customers engaged in the transportation business and "commercial" sales as transactions which, like sales of manufacturing machinery and equipment, could not qualify as retail sales under the Section 13 (a) (2) and (4) exemption.

Petitioner contends that Congress in 1949 intended, by placing sales to businesses in the transportation industry and "commercial" sales outside the retail concept, to make such transactions ineligible for exemption under

the 1949 amendments. If that contention were sound, no less a personage than John F. Kennedy together with one no less expert on labor legislation than Wayne Morse made prodigal use of the Senate's time during 1957. The late President Kennedy, as Senator, in 1957 offered the "Kennedy Bill to Amend the Fair Labor Standards Act of 1938, as amended, . . ." (103 Cong. Rec. 5440) in part to modify or eliminate exemptions from wage-hour coverage. One provision of this Bill would have amended the 1949 enactment of Section 13 (a) (2) by redefining "retail and service establishments" to mean those making not more than 25 percent of their sales "for resale or to customers engaged in mining, manufacturing, **transportation, commercial** or communications business" (emphasis added) (Id., at 5441). Senator Morse during the same year offered his bill entitled "Fair Labor Standards Amendments of 1957" (103 Cong. Rec. 2099) which would also have adopted the proviso enacted in 1949 as part of Section 13 (a) (3) to re-define a "retail or service establishment" under Section 13 (a) (2) to mean one "not more than 25 percentum of whose annual dollar volume of sales of goods or services (or both) is for resale or is made to customers who are engaged in a mining, manufacturing, **transportation, commercial** or communications business" (emphasis added) (Id., at 2108). The late President Kennedy was chairman in 1957 of the Senate Sub-committee on Labor, had served on that sub-committee during years prior to 1957 while he was a senator and in 1949 had been a member of the House Committee on Education and Labor when it acted upon the 1949 amendments. If, as petitioner argues, Congress in 1949 intended to place sales to customers engaged in the transportation business and "commercial" sales outside the retail concept, respondents' small wonder is why Congress did not expressly do so by using the proviso enacted in 1949 as part of Section 13 (a) (3), and respondents' greater

wonder is why two outstanding and active statesmen in the field of labor legislation during this period were not apprised of this 1949 Congressional intent by 1957. There would seem to be only two possible answers. One is that Senators Kennedy and Morse in 1957 offered further restrictions upon the exemption of retailers from wage-hour law coverage as enacted in 1949, which both of them knew to be needless and redundant—and this answer should be acceptable to no one. The other and, respondents submit, correct answer is that Congress in 1949 did not adopt the restriction from Section 13 (a) (3), excluding sales to carriers and "commercial" sales, to limit the retail concept under Section 13 (a) (2) because Congress did not in 1949 or ever intend to classify sales to customers in the transportation business and "commercial" sales as being the same as sales of manufacturing machinery and equipment used in the production of goods, therefore outside the retail concept. Not only did Congress not intend in 1949 to exclude sales to carriers or "commercial" sales from the retail concept, but, since neither the Kennedy Bill (S. 1853) nor Senator Morse's bill (S. 1267) to accomplish that exclusion appears to have even been reported out of the committee which Senator Kennedy then served as chairman, apparently there was not wide acceptance of that exclusion when it was proposed for the first time in 1957. It is significant that had Congress in 1949 or at any time thereafter intended to exclude sales to carriers or "commercial" sales from the retail concept under Section 13 (a) (2), the proviso stating that intention could have been adopted from Section 13 (a) (3) as enacted in 1949. The failure to use this same proviso in 1949 under Section 13 (a) (2); the apparent disinterest in this further limitation on the exemption of retailers under Section 13 (a) (2) using the proviso from Section 13 (a) (3) when offered in that form by Senators Kennedy and Morse in 1957; and the

failure to exclude sales to carriers and "commercial" sales as outside the retail concept when Congress in 1961 enacted Section 3 (s) as a further limitation upon retailers exempt from wage-hour law coverage under Section 13 (a) (2); all indicate the invalidity of petitioner's argument on this point.

Respondents' business is not only within the retail concept, its pattern of operation exemplifies the typical retailer which Congress in 1949 exempted from wage-hour law coverage. More than 50 percent of its sales are made in Tennessee, where it is located (Findings and conclusion, R. 32 a, et seq.; not controverted by petitioner). Less than 25 percent of its total sales were for resale (petitioner's Brief, p. 12) so that more than 75 percent of its total sales were "to ultimate consumers" (95 Cong. Rec. 12500). It has many of the features of "repair garages, filling stations and the like" (95 Cong. Rec. 11003) whose services, as repeatedly emphasized during the debate over the 1949 amendments, "whether rendered to private householders or to business customers, will be retail so long as they are regarded as retail services in such trade" (Ibid). Respondents' service department "remains open 12 hours a day and provides round-the-clock emergency call service" and it adapts its services "to the customers' special needs" (Petitioner's Brief, p. 5). It is characteristic that "retail and service businesses operate on a 6-day work week because they are necessarily adapted to the living requirements and buying habits of their communities" (95 Cong. Rec. 12492). Congress in 1949 exempted such retailers from wage and hour regulations because their service function is essential to their customers and could not be performed on the same basis if minimum wage and maximum hour provisions of the law applied to them:

> "No rational distinction can be drawn between establishments selling to business customers and those

selling to household users, for purposes of the exemption, because, first, generally the same establishment will sell to both types of users; and, second, even where one establishment is selling to business users exclusively and another to household users only, both are local businesses and would have equal difficulty in conforming to national wage and hour standards, both are located in the same community, and both draw employees from the same labor pool and have similar working conditions."

(95 Cong. Rec. 12498).

Some of respondents' customers are in interstate commerce; under the 1949 amendments "it is immaterial that the sales . . . are made to customers who are engaged in interstate commerce or in the production of goods for interstate commerce" (95 Cong. Rec. 14931). The matter of quantity discounts is also to be determined by the usages and practices in the particular industry so that "**a wholesale transaction would be one in such quantities as to be beyond the industry's standards for retail sales** and when the purchases are made in such quantities as to entitle the purchaser to discounts such as are allowed in wholesale transactions" (emphasis added) (Id., at 12501). The tire industry's standard for a wholesale sale is a sale for resale (Petitioner's Brief, p. 20). Sales by respondents to fleet owners and the like are in quantities no larger than the sales to small businesses or individuals (R. 250a-252a); the prices are the same to all customers (R. 82a, 83a, 85a-86a). The use of particular salesmen by many tire retailers to learn about and serve business accounts and the necessity for separate accounting control records for those accounts (R. 345a, 470a, 488a) is noted by petitioner (Brief, pp. 6-7). No strict line of demarcation is maintained among respondents' salesmen (R. 51a, 63a, 106a). The argument by petitioner based on the segregated accounting controls over "commercial" sales is

without merit because the same accounting records reflect similar segregation of budget or installment sales by the same tire stores for the same control purposes (Exhibit K-de Bruin; Exhibit 1-Hindersheid; Exhibit 5-Curry). Those budget and installment sales are plainly retail sales, yet are given the same treatment which petitioner contends makes wholesale transactions out of "commercial" sales.

III. Repetition of Petitioner's Contentions.

Petitioner's contentions that the opinions of the courts below in this case turn upon "words" or "labels" and his reliance upon nursery rhymes in support thereof are virtually verbatim repetition of parts of his petition for a writ of certiorari; answer thereto in respondents' reply brief will not be repeated here.

CONCLUSION.

The Administrator's tenacious insistence upon the business use test and the criteria of academics and doctrinaires to restrict the exemption under Section 13 (a) (2) and (4) in derogation of plainly expressed legislative intent should be stopped by this Court. The plainly expressed legislative intent regarding that exemption was applied in this case by the courts below. The judgment below should be affirmed.

Respectfully submitted,

/s/ .....
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/s/ .....
TOM MITCHELL, JR.,
Attorneys for Respondents.